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No. 89-1953

In the Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under Sections 1208(b) and 1209 of the Postal Reorganization Act, 39 U.S.C. 1208(b) and 1209, a federal court may order tripartite arbitration of a jurisdictional dispute between an employer and two unions, both of which have collective bargaining agreements with the employer that provide for arbitration of jurisdictional disputes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 893 F.2d 1117. The opinion of the district court (Pet. App. 13a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1990. A petition for rehearing was denied on March 15, 1990. Pet. App. 12a. The petition for a writ of certiorari was filed on June 13, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner American Postal Workers Union (APWU) and respondent National Post Office Mail Handlers, Watchmen and Group Leaders Division of the Laborers' International Union of North America (Mail Handlers) represent employees of respondent United States Postal Service (USPS). Pet. App. 2a. Until 1981, the two unions engaged in joint collective bargaining with USPS under a collective bargaining agreement that permitted either union to intervene in any pending arbitration proceeding involving a dispute over work assignments. *Ibid.* Since 1981, however, petitioner and the Mail Handlers have bargained separately with USPS under similar collective bargaining agreements. Both agreements contain identical, broad arbitration provisions covering jurisdictional disputes, but do not expressly provide for tripartite arbitration. *Id.* at 7a.

The instant controversy arose out of USPS's assignment to the Mail Handlers of certain work at the San Francisco Airport Mail Facility. Pet. App. 3a. Petitioner filed a grievance alleging that a USPS regional instruction binding on all three parties required that the work be assigned to its members. *Ibid.* The APWU-USPS dispute was scheduled for arbitration, and the Mail Handlers then sought to intervene in this arbitration. *Ibid.* While recognizing the Mail Handlers' interest in the matter, the arbitrator concluded that the Mail Handlers could not intervene because the APWU-USPS agreement does not provide for tripartite arbitration. *Ibid.*

2. USPS then brought this action in federal district court in San Francisco against both petitioner and the Mail Handlers, seeking to compel tripartite arbitration. Pet. App. 3a. The parties filed a number

of crossclaims and counterclaims--including the Mail Handlers' request for a permanent injunction requiring tripartite arbitration for any future jurisdictional disputes between the two unions—and then moved for summary judgment. *Ibid.*; see also *id.* at 13a, 17a.

The district court granted USPS's motion for summary judgment, denied petitioner's motion for summary judgment, and denied the Mail Handlers' request for a permanent injunction. Pet. App. 13a-20a. The court noted that Section 1208(b) of the Postal Reorganization Act, 39 U.S.C. 1208(b), "is equivalent" to Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185. Pet. App. 14a n.1. The court then observed that under Section 301 —which "gives federal courts broad jurisdiction to handle many types of controversies that arise between labor and management"—"[c]ourts have the power to order performance that is, in literal terms, outside the scope of the collective bargaining agreement." Pet. App. 14a-15a (citing, *inter alia*, *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960), and *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 546-551 (1964)). The court further stated that "[p]ursuant to this broad judicial power, courts have frequently ordered tripartite arbitration for jurisdictional labor-management disputes, even absent contractual provisions for such arbitration." Pet. App. 15a (citing cases).

The district court then determined that tripartite arbitration was warranted on the facts of this case. The court stressed that "both collective bargaining agreements have broad, nearly identical arbitration provisions," that any arbitration decision here will "necessarily affect both unions," and that tripartite

arbitration will eliminate the possibility of conflicting awards. Pet. App. 16a. The court also noted that the Mail Handlers agreed to be bound by the procedural provisions of the APWU-USPS arbitration agreement. *Ibid.* Accordingly, the court concluded that "ordering tripartite arbitration in this instance is the fairest and most efficient course of action." *Id.* at 16a-17a. The court declined to issue the permanent injunction requested by the Mail Handlers, however, declaring that "[i]t would be inappropriate to issue such an order without consideration of the particular facts [of a jurisdictional dispute] to determine if tripartite arbitration is warranted." *Id.* at 17a.

3. Petitioner appealed, and the court of appeals affirmed. Pet. App. 1a-11a. After finding that the district court's order compelling arbitration was a final appealable order, *id.* at 3a-4a, the court held that the district court had authority to order tripartite arbitration in this situation. *Id.* at 4a-9a. The court of appeals emphasized that both the APWU-USPS collective bargaining agreement and the Mail Handlers-USPS agreement provide for arbitration of the instant jurisdictional dispute (*id.* at 4a-6a), that the arbitration provisions in both agreements are broad (*id.* at 7a), and that the Mail Handlers agreed to follow the arbitration procedures established by the APWU-USPS agreement. *Ibid.* The court stated that "[c]ompelling all three parties in this case to submit their grievance to the same arbitration is practicable, economical, convenient, and fair" (*id.* at 8a), since "[i]t not only avoids duplication of effort, but also avoids the possibility of conflicting awards." *Ibid.* The court thus concluded that "[i]n light of the trend in federal common law

toward compelling tripartite arbitration under similar circumstances, * * * the district court did not err in ordering the APWU, the Mail Handlers, and the USPS to engage in tripartite arbitration." *Id.* at 8a-9a (citing *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957)).[1]

ARGUMENT

Petitioner acknowledges that there is no conflict in the circuits, and that a substantial number of federal courts have endorsed the practice of court-ordered tripartite arbitration where all parties have contracted to arbitrate the dispute at issue. Pet. 20-21 & nn.13, 14.[2] Nonetheless, petitioner contends that the Ninth Circuit's holding deserves review by this Court because it rests upon a "fundamental misunderstanding" of this Court's decisions and raises a "critical issue of national labor policy." Pet. 6. The Ninth Circuit's decision, however, reflects no such misunderstanding and raises no issues that demand this Court's attention.

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[1] The court rejected petitioner's contention that the action was out of time under federal and state law. Pet. App. 9a-11a. Petitioner does not seek review of this aspect of the court of appeals' holding.

[2] In addition to the cases cited at Pet. 20 nn.13, 14, see *United Steelworkers* v. *Crane Co.*, 456 F. Supp. 385 (W.D. Pa. 1978), rev'd in part on other grounds, 605 F.2d 714 (3d Cir. 1979), and *Local No. 552, United Brick & Clay Workers* v. *Hydraulic Press Buick Co.*, 371 F. Supp. 818 (S.D. Mo. 1974).

Meat Cutters Local 299 v. *Alpha Beta Markets, Inc.*, 95 L.R.R.M. (BNA) 2509 (S.D. Cal. 1977), cited by petitioner at Pet. 20 n.13, is not to the contrary. One of the competing unions in that case had *no* arbitration clause that encompassed jurisdictional disputes.

1. Petitioner contends that the body of case law upholding authority to order tripartite arbitration should be repudiated by this Court as contrary to the principle that arbitration is purely voluntary. Pet. 6-22. Petitioner's contention that the tripartite arbitration order in this case mandates involuntary arbitration lacks force: as the court of appeals noted, Pet. App. 16a, this case does not involve the imposition of arbitration upon a party that has not agreed to arbitrate. The collective bargaining agreement between each union and the USPS contains an extremely broad grievance-arbitration clause encompassing virtually any kind of labor dispute, including the jurisdictional dispute at issue here. *Id.* at 5a. Moreover, neither collective bargaining agreement expressly precludes tripartite arbitration.

Compelling tripartite arbitration therefore does not require petitioner to arbitrate a dispute that it has not already agreed to arbitrate, or as to which tripartite arbitration is expressly forbidden under its collective bargaining agreement. Instead, compelling tripartite arbitration merely requires the APWU to arbitrate its admittedly arbitrable jurisdictional dispute in a proceeding in which another union participates. Particularly in this case, where the Mail Handlers have agreed to tripartite arbitration pursuant to the procedures found in the APWU-USPS agreement and before the arbitrator chosen by petitioner and the Postal Service, an order compelling tripartite arbitration requires only that petitioner tolerate the Mail Handlers' participation in the proceeding. Such an order can hardly be characterized as making petitioner arbitrate against its will. Indeed, the order is more analogous to a decision that, if arbitration provisions are invoked under two collective agreements

involving the same employer, the two arbitration proceedings may properly be consolidated.[3]

Thus, the courts have generally ordered tripartite arbitration where all parties have consented to arbitrate the type of dispute at issue. For example, in *Columbia Broadcasting Sys., Inc. (CBS)* v. *American Recording & Broadcasting Ass'n*, 414 F.2d 1326, 1329 (1969), the Second Circuit ordered tripartite arbitration of a jurisdictional dispute after observing that the employer and each of the competing unions had entered into a collective bargaining agreement that contained a grievance-arbitration procedure encompassing those disputes. See also Mail Handlers' Br. in Opp. 7 & n.8 (citing district court cases). In contrast, the Seventh Circuit refrained from ordering tripartite arbitration because the collective bargaining agreement of one union contained no arbitration clause of any kind. *Laborers' Int'l Union* v. *W.W. Bennett Constr. Co.*, 686 F.2d 1267 (1982). Finally, in *United Indus. Workers* v. *Kroger Co.*, 900 F.2d 944 (1990), the Sixth Circuit recently declined to grant the employer's request for tripartite arbitration with an unwilling union, reasoning that, even though the union's contract contained an arbitration clause, there was no "duty to engage in separate bipartite arbitration over the subject matter" because

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[3] Moreover, in contrast to a case that might arise in the private sector if each union's contract contained conflicting terms governing the allocation of work, there is no dispute here about the substantive body of law that controls this arbitration. A USPS regional instruction, binding on all parties, controls the assignment of work in this case. See Pet. App. 3a.

no grievance had been filed under that union's contract with the employer. *Id.* at 947.[4]

2. This Court has recognized that arbitration agreements must be applied in light of the priorities of national labor policy. See, *e.g.*, *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964) (after merger with company having pre-existing collective bargaining agreement, acquiring company is bound by arbitration provisions of that agreement). Thus, petitioner ignores the mandate that federal courts, in interpreting and enforcing collective agreements, should develop a body of federal common law under Section 301 (and Section 1208)[5] that promotes such

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[4] As the Sixth Circuit recognized, 900 F.2d at 947, *Kroger* can be distinguished from the present case because of the absence in *Kroger* of the requisite "contractual nexus" between the employer and the union resisting arbitration. In *Kroger*, the court held that an order for tripartite arbitration was inappropriate because neither of the parties to one of the collective agreements had filed a formal grievance. Moreover, the union that was a party to that collective agreement did not seek arbitration in any form. In this case, although the Mail Handlers did not file a formal grievance, *both* unions expressed willingness to arbitrate the jurisdictional dispute with the employer.

[5] Section 1208(b) of 39 U.S.C. is the "[postal] analogue," *National Ass'n of Letter Carriers* v. *United States Postal Serv.*, 590 F.2d 1171, 1174-1175 (D.C. Cir. 1978), of Section 301 of the LMRA, which authorizes suits by and against labor unions. 29 U.S.C. 185. Accordingly, federal courts apply private sector Section 301 law in resolving suits brought under 39 U.S.C. 1208(b). Pet. App. 4a-5a; *National Ass'n of Letter Carriers* v. *United States Postal Serv.*, 590 F.2d at 1174-1175; *American Postal Workers Union* v. *United States Postal Serv.*, 823 F.2d 466, 469 (11th Cir. 1987); *Columbia Local, American Postal Workers Union* v. *Bolger*, 621 F.2d 615 (4th Cir. 1980); *Melendy* v. *United States Postal Serv.*,

important objectives as the expeditious and orderly resolution of disputes. As this Court has stated in its landmark decision in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957):

> We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. * * * The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. *Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.*

Id. at 456-457 (emphasis added). Similarly, in the context of a Postal Service case, the Court has recently stated that "[i]n defining the relationships created by a [collective bargaining] agreement, the Court has applied an evolving federal common law grounded in national labor policy." *Bowen* v. *United States Postal Serv.*, 459 U.S. 212, 224-225 (1983).

In accordance with these principles, and relying in part on cases decided under Section 301(a) of the LMRA, this Court, in *Transportation-Communication Employees Union* v. *Union Pac. R.R.* (*Transportation-Communication Employees*), 385 U.S. 157 (1966), has upheld an order of tripartite arbitration of a jurisdictional dispute under the Railway Labor

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589 F.2d 256 (7th Cir. 1978); see also *Bowen* v. *United States Postal Serv.*, 459 U.S. 212, 232 n.2 (1983) (White, J., concurring in part and dissenting in part).

Act, 45 U.S.C. 151 *et seq.* In that case, the Court stated that a collective bargaining agreement "is not an ordinary contract," but a "generalized code" that calls into being a "new common law." 385 U.S. at 160-161. In interpreting collective bargaining agreements, "particularly * * * for the purpose of settling a jurisdictional dispute over work assignments," it is necessary to "consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Id.* at 161.

Following this Court's lead in *Transportation-Communication Employees*, the Second Circuit in *CBS*, 414 F.2d at 1329, ordered tripartite arbitration of a jurisdictional dispute between two unions, holding that the order was "in line with the overall national policy furthering industrial peace by resort to agreed-upon arbitration procedures." *Id.* at 1328. Other courts of appeals have endorsed the reasoning and the result in *CBS* as consonant with the federal courts' authority under Section 301. See *Laborers' Int'l Union* v. *W.W. Bennett Constr. Co.*, 686 F.2d 1267 (7th Cir. 1982); *Window Glass Cutters League* v. *American St. Gobain Corp.*, 428 F.2d 353 (3d Cir. 1970).[6]

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[6] As the Mail Handlers observe in their brief in opposition, at 16, a tripartite arbitration order is, if anything, even more appropriate in this case than in a case arising under Section 301. Unlike the LMRA, the Postal Reorganization Act requires mandatory fact finding and arbitration where parties reach an impasse in bargaining. By thus mandating arbitration without the consent of the parties, the Postal Reorganization Act, "even more so than the [LMRA], expresses a strong policy favoring arbitration of collective bargaining disputes." *Ibid.*

In the instant case, as the court of appeals observed, tripartite arbitration "not only avoids duplication of effort, but also avoids the possibility of conflicting awards." Pet. App. 8a. The court below thus properly exercised its authority, in interpreting and enforcing collective agreements, to further the resolution of this jurisdictional dispute in a manner that is "practicable, economical, convenient, and fair." *Ibid.*[7]

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[7] Petitioner also erroneously relies (see Pet. 13 n.9) on the fact that, when the LMRA was enacted in 1947, Congress did not give the National Labor Relations Board the authority to order compulsory arbitration of labor disputes. Rather, Congress defined as an unfair labor practice an attempt by one union to "forc[e] or requir[e]" an employer to assign work to one craft of employees rather than another. 29 U.S.C. 158(b)(4)(D). Upon finding that a strike in violation of this provision has occurred, the NLRB is empowered to settle the jurisdictional dispute. 29 U.S.C. 160(k); *NLRB* v. *Radio Engineers*, 364 U.S. 573 (1961).

Petitioners infer far too much from the legislative history of the LMRA. Congress's paramount concern in 1947 was with coercive labor activities; accordingly, Congress gave the NLRB authority to resolve jurisdictional disputes that generated strikes. The fact that Congress in 1947 did not take the further step of expressly providing for compulsory arbitration by the NLRB in a nonstrike context does not suggest a congressional judgment that *courts* should not use their authority to interpret and enforce collective agreements to aid in resolving jurisdictional disputes arising in that context. Indeed, the statute itself is supportive of alternative means to resolve jurisdictional disputes. See 29 U.S.C. 160(k) (NLRB deprived of jurisdiction if parties agree to resolve dispute in other ways).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1990

U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20088